No. 87-1818

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

ROBERT E. BADHAM, et al.,
Appellants,

VS.

MARCH FONG EU, et al.,
Appellees.

On Appeal From The United States District Court For The Northern District Of California

SUPPLEMENTAL MEMORANDUM OF THE MEMBERS OF THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

IRELL & MANELLA
JONATHAN H. STEINBERG*
BRUCE A. WESSEL
1800 Avenue of the Stars
Suite 900
Los Angeles, CA 90067
(213) 277-1010
Attorneys for Appellees
The Members of the
California Democratic
Congressional Delegation

*Counsel of Record
December 14, 1988

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I.

THE JURISDICTIONAL ISSUE

In its Brief Re: "Petition for Rehearing (And Related Relief)," the Delegation considered Appellants' uncertainty about the proper forum for their challenge to the district court's order, which is currently before both this Court and the Ninth Circuit.[1] Since filing that brief, the Delegation has not identified any addition authorities or considerations that bear on the issue. Accordingly, the

[1]Since Appellants have let the stay of their Ninth Circuit appeal expire, the appeal is apparently underway. On November 23, 1988, the District Court transmitted the Certificate of Record and hearing transcripts to the Ninth Circuit.

Delegation rests on the discussion it set forth in that brief.

II.

THE DISSENT UNDERLINES THE ABSENCE OF ANY SUBSTANTIAL FEDERAL QUESTION IN THIS APPEAL

A. The Bandemer Proof and the Parallel Badham Allegations Both Fall Far Short of Satisfying Any Acceptable Threshold Constitutional Test for Partisan Gerrymander Claims.

Perhaps the central disagreement in the Appellants' and the Delegation's respective briefs is whether this case is materially different from *Davis v. Bandemer*. If indeed *Badham* merely presents a California Republican version of the Indiana Democrats' constitutionally inadequate claims in *Bandemer* — or less — then *Bandemer* forecloses *Badham* and plenary consideration of this appeal is unnecessary. While Appellants insisted that the two cases were "strikingly similar"[2] when the Indiana Democrats prevailed at trial, now that this Court found the *Bandemer* evidence so wanting, Appellants respond to the Delegation's chart detailing the cases' striking similarities with the charge: "disingenuous." Appellants' Brief in Opposition to Delegation's Motion to Dismiss or Affirm at 2.

Even the dissent disagrees. In concluding that Appellants' case was "largely foreclosed" by *Davis v. Bandemer*, Judge Schnacke was able to discern but a single signifi-

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[2]This was the characterization Appellants urged on this Court when they sought to have their case heard together with *Bandemer* in 1985. *See* Petition for Writ of Certiorari at 6 n.5, 23, *Badham v. Secretary of State of California*, 470 U.S. 1084 (1985) (No. 84-1226).

cant difference between the two cases: duration. Petition for Rehearing at 1a. That single discerned difference, however, is wholly inadequate to permit a different result in California from the one this Court mandated in Indiana. To have alleged a claim that could have passed the *Bandemer* threshold, the California Republicans would have had to have made allegations wholly different in kind from those that this Court so flatly rejected in *Bandemer*. No such allegations were made, nor could they have been.

It is important to recall that the Indiana Democrats alleged and proved a body of facts that accords well with the popular notion of a gerrymander. They proved that the Republicans had excluded both the Democrats and the voting public from any participation in the drafting of the plan. *Davis v. Bandemer,* 478 U.S. 109, 106 S. Ct. 2797, 2802 n.5, 2833 (1986). They proved that the plan was passed on strict party lines through a hasty and unorthodox legislative procedure that was controlled by a solidly Republican legislature and backed up by a Republican governor. *Id.* at 2800, 2801, 2833. They proved that the sole and admitted purpose of the plan was to favor Republicans and harm Democrats. *Id.* at 2802 n.5, 2834. They proved that the plan exploited "strange" districts that "conspicuously ignored" traditional "neutral" criteria while they "carved up" counties, cities and even townships for partisan gain. *Id.* at 2802, 2833. They proved that the Republicans gave "no consideration" to communities of interest, and disadvantaged black voters in a particularly "hard and harsh" manner. *Id.* at 2834; *Bandemer v. Davis,* 603 F. Supp. 1479, 1488 (S.D. Ind. 1984). The Republicans themselves admitted that their House plan was designed to establish 56 seats that would be safely held by Republicans, but only 30 safe Democratic seats. *Davis v. Bandemer,* 106 S. Ct. at 2834. And the Democrats even proved that the Republicans selec-

tively employed at-large districts in certain areas to "stack" and "pack" Democratic citizens and thereby dilute their votes. *Id.* at 2801. What the Indiana Democrats proved explains why Democrats regarded the *Bandemer* case as a cause celebre.

This Court, however, found these facts wholly irrelevant to the required threshold showing of unconstitutional effect. "[A]side from the election results, *none* of the facts found by the District Court were relevant to the question of discriminatory effects . . . [N]o unconstitutional effects were found as a matter of law. . . ." *Id.* at 2815 n.20 (emphasis added). The parallel allegations in the present case, outlined at pages 14-16 of the Delegation's Motion to Dismiss or Affirm, can be no less irrelevant. What is left, then, in each case, are claims about election results, as the dissent below recognized. But *Bandemer* clearly teaches that such claims, standing alone, are not enough.

The *Bandemer* plurality opinion made two critical distinctions. First, it separated the issue of partisan intent from that of unconstitutional effect. It assumed that the requisite intent would usually be apparent in the context of a partisan gerrymander claim. *Id.* at 2808. Second, it re-emphasized the distinction, drawn in the racial gerrymandering cases, between non-proportional election results on the one hand, and indicia of lack of fair representation or power in the political process as a whole, on the other:

> [T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from the

> perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters.[3] This is true even in a safe district where the losing group loses election after election. Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult . . .

Id. at 2810. Accordingly, the Court concluded:

> [U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole.

Id. The plurality then described what would constitute such "degradation":

> [W]e have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. In those

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[3]In response to this requirement, Appellants point weakly to paragraphs 20, 26, and 28 of their Complaint. Juris. Stat. at 15. The inadequacy of those allegations is underlined by the later claim that they "were willing" to produce evidence or allegations on the issue (Juris. Stat. at 16), but did not allege any of them because "it was clear to appellants" that the district court would not have found these allegations sufficient. Juris. Stat. at 20 n.10.

> cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process. . . . [T]hese prior cases lead to the analogous conclusion that equal protection violations may be found only where a history . . . of disproportionate results appears in conjunction with similar indicia.

Id. at 2814. It was precisely the absence of these kinds of indicia that doomed the Indiana Democrats' claims in *Bandemer* and the California Republicans' claims in *Badham*.

Only an entirely new constitutional test, without historical precedent, could have brought about a different result. Justice Marshall's dissent in *Mobile v. Bolden* provides a generous review of this Court's gerrymandering precedents. Even in urging a more expansive reading of those cases, Justice Marshall found no constitutional history to support the kind of test that the *Bandemer* and *Badham* plaintiffs would have needed:

> Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy. In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice.
>
> The test for unconstitutional vote dilution, then, . . . requires electoral minorities to prove far more than mere lack of success at the polls.

Mobile v. Bolden, 446 U.S. 55, 110 n. 7 (1980) (citations omitted). Justice Marshall concluded:

> The constitutional protection against vote dilution found in our prior cases does not extend to those situations in which a group has merely failed to elect representatives in proportion to its share of the population. To prove unconstitutional vote dilution, the group is also required to carry the far more onerous burden of demonstrating that it has been effectively fenced out of the political process. . . . The vote dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political functions to ignore them.

Id. at 122. Appellants' case could only have gone forward under a special rule that relieved the major political parties of the kind of burdens imposed on racial minorities in proving a constitutional violation.

Even Appellants' election result allegations fall well short of what could plausibly constitute a sufficient predicate for intervention by the federal judiciary. Election results under A.B.2X are nearly or exactly proportional. The facts of which the District Court took judicial notice demonstrated that Republicans and Democrats have been elected in a rough proportion to their share of the two-party vote in each of the three elections that have taken place under A.B.2X.[4] In 1984 and 1986, only three or four

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[4]As was demonstrated below and in the Assembly's Motion to Dismiss, Appellants (all of whom are alleged to be registered Republicans) also benefit from representation almost exactly proportional to their share of the two parties' respective registered voters. Justice Marshall's reference to proportionality to a group's "share of the population" demonstrates that the seats/votes measure of proportionality enjoys no special constitutional privilege. *See* Delegation's Motion to Dismiss or Affirm at 26.

seats separated the elections from perfect seats-votes proportionality. *See* Delegation's Motion to Dismiss or Affirm at 27 n.18, Appendix A. In 1988, Republicans received but *one* fewer seat than they would have won under a rigid proportional representation scheme corrected for differential turnout in the forty-five Congressional districts.[5] As the record considered by the District Court revealed, more disproportional results occurred, election after election, under the Special Masters' plan that the Complaint itself sets up as a neutral ideal. *See* Complaint, ¶¶ 9, 25. In 1974, 1976 and 1978, the first three elections in which it was used, the Special Masters' plan gave Republicans 35, 33 and 40 percent of the seats, respectively, for 41, 44 and 48 percentage, respectively, of the two-party vote. *See Official Statement of the Vote*, 1974,

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Appellants' belated attack on California's registration data is misconceived; registration data, like census data, may not always be precisely accurate. But precise proportionality is not required. In any case, the record below is replete with citations to registration data by Appellants, whose early motion for preliminary injunction relied heavily on an analysis of that data. Even had the district court relied on the registration data in dismissing the Complaint, Appellants could hardly assert that reliance as error.

[5]In the 45 separate 1988 congressional elections, Republican candidates and Democratic candidates received 3,929,696 and 4,675,678 votes, respectively. Turnout in these 45 districts varies significantly; for example, in District 14, there were 267,920 votes cast, while in District 25, only 94,108 votes were cast. This differential, of course, skews the seats/votes analysis. See B. Cain "The Reapportionment Puzzle" at 75-76; Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest, Elusive or Illusory?*, 33 U.C.L.A. L. Rev. 1, 49-52 (1985). Correcting for turnout, the Republicans and Democrats received, respectively, 42.6 and 57.4 percent of the two-party vote. 42.6 percent of the 45 seats is 19.2 seats; the Republicans won 18. *See* Appendix A. Even without correcting for turnout, the Republicans received only 45.7 percent of the two-party vote, which would have yielded 20.6 seats.

1976, 1978; Delegation's Motion to Dismiss or Affirm, Appendix A. Does this persistent departure from exact proportionality indicate a deprivation of constitutional rights at the hands of the Masters? The slight deviations from exact seats/votes proportionality under A.B.2X are *de minimis* and less even that the deviations under Appellants' "neutral" ideal. Only if the Constitution were to require exact or almost exact seats/votes proportionality could the effects alleged by Appellants be said to satisfy a reasonable threshold requirement.

The preceding analysis demonstrates that the inadequacies of Appellants' allegations of effects go far beyond what could be remedied by allegations about their duration. But even the allegations of duration fall short. The Complaint pointedly engages in no prognostication past the 1990 elections, contrary to the suggestion in the dissent. Complaint, ¶ 27. The reason for this restraint is simple. The political system in California, at least insofar as it affects congressional elections, is not one where an elected body could draw lines to perpetuate itself decade after decade, free from political checks and balances. The Constitution requires that the California Legislature and the governor soon to establish a new redistricting plan, (with an expected five additional seats) for congressional elections in the 1990's. The Republicans have now controlled the office of the governor for two terms. As Ronald Reagan demonstrated in 1972, the governor has the power to veto redistricting bills that he perceives as harmful to his party's interest. *See Legislature v. Reinecke,* 6 Cal.3d 595, 99 Cal.Rptr. 481, 492 P.2d 385 (1972). Even if they were to lose the governorship, the Republicans will also have the power of the referendum, as they did in 1982, to veto by popular vote any redistricting bill of which they disapprove. *Assembly v. Deukmejian,* 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939 (1982). Their Complaint

admits that they used this aspect of the political process with "overwhelming" success in 1982 but does not explain why they did not even attempt to repeat this success in a challenge to A.B.2X. Complaint, ¶ 11.

B. The Dissent's Electoral Competition Analysis Is Flawed

The remainder of the dissent consists of a plea for increased competitiveness in congressional elections. There can be no gainsaying that elections in the United States have come increasingly to favor incumbents. *See* Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics,* 87 Colum. L. Rev. 1325, 1374-75 (1987). Indeed, in the 435 congressional elections that recently took place, only 6 incumbents lost and only 9 seats changed parties. Cohen, *The New Congress; Election '88,* 20 Nat'l. Journal 2859, 2860 (1988). But the suggestion that the Constitution requires this Court to intervene to increase competition and to lessen the power of incumbents is misguided on several grounds.*

To begin with, the task would call for a roving judicial commission over almost all aspects of political life. Political analysts assign a wide variety of causes to the power of incumbency, including the availability of media coverage, the franking privilege, and greater access to contributions. *See, e.g.,* Schuck, *supra,* at 1375-77; Common Cause, "Toward a System of Fair and Effective Representation," 17-24 (1977).

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*For a review of the merits and defects of a constitutional "competitiveness" criterion, *see* Lowenstein & Steinberg, *supra,* at 37-44; B. Cain, *supra,* at 67-68.

Second, it is at best unclear what constitutional provision could be said to authorize such a commission. It could not be the Equal Protection Clause, since there are apparently-entrenched incumbents of *both* parties in California and elsewhere. If it is the *proportion* of such incumbents that is said to be in need of correction, then the Court is again being directed towards a requirement of proportional representation, which it has resolutely resisted. At a minimum, the Court would have to see its way clear to overruling *Gaffney v. Cummings,* which upheld a redistricting plan concededly designed to apportion safe seats to each party roughly in proportion to its estimated share of the voters statewide.

Finally, the application of a constitutional anti-incumbency principle to A.B.2X would be perplexing. The election results of which the District Court took judicial notice demonstrate that, since A.B.2X took effect, the Democrats have received a slightly *increasing* percentage of the state-wide vote. *See* Delegation's Motion to Dismiss or Affirm, Appendix A and Appendix A herein. Yet during this same period, it was the *Republicans* who gained one seat, which the Democrats lost to the highly conservative Republican partisan, Robert Dornan.[6] Even if the constitution did command that congressional districts must promptly respond to the changing barometer of partisan preference, California's temperate partisan weather would not dictate any perceptible swing in the composition of its congressional delegation, and would certainly not call for greater Republican gains.

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[6]The district in which the Republicans scored this victory was one that Appellants had singled out as an example of misshapen districts that locked in Democrats. The day after the election, Mr. Dornan declared: "I have made this into a safe conservative district." Los Angeles Times, Nov. 5, 1986 at Pt. I, p.3.

III.

CONCLUSION

California is the Republicans' Indiana, only less. The dismissal below followed necessarily from the reversal this Court handed to the *Bandemer* plaintiffs. A contrary result is possible only if the major political parties are to be the beneficiaries of a special rule that would make it easier for those parties to present a gerrymander claim than it is for racial minorities, and only if the Constitution were to require essentially exact seats/votes proportionality.

Respectfully submitted,

IRELL & MANELLA
JONATHAN H. STEINBERG
BRUCE A. WESSEL
Attorneys for Appellees
The Members of the
California Democratic
Congressional Delegation

APPENDIX A

Semi-Official Canvass of the Vote

November 8, 1988

General Election

Compiled by
MARCH FONG EU
Secretary of State

Summary of Votes Cast for Congress

1st District	
Bosco, Dem-Inc	150,714
Vanderbilt, Rep	67,507
Fried, P&F	20,960
2nd District	
Herger, Rep-Inc	136,426
Meyer, Dem	89,616
Pendery, L	6,118
3rd District	
Matsui, Dem-Inc	175,112
Landowski, Rep	70,723
4th District	
Fasio, Dem-Inc	174,436
5th District	
Pelosi, Dem-Inc	113,838
O'Neill, Rep	26,303
Zuur, P&F	3,587
Grove, L	3,124
6th District	
Boxer, Dem-Inc	160,805
Steinmetz, Rep	57,044
7th District	
Miller, Dem-Inc	158,451
Last, Rep	71,631
8th District	
Dellums, Dem-Inc	152,380
Cuddihy, Rep	69,412
Condit, P&F	5,049

9th District	
Stark, Dem-Inc	145,917
Hertz, Rep	53,797
10th District	
Edwards, Dem-Inc	132,732
Watson, L	21,225
11th District	
Lantos, Dem-Inc	138,579
Quraishi, Rep	47,032
Wade, L	4,586
Martinez, P&F	2,804
Kudrovzeff, Al	1,903
12th District	
Campbell, Rep	124,151
Eshoo, Dem	112,442
Grey, L	5,535
13th District	
Mineta, Dem-Inc	132,802
Sommer, Rep	58,706
Webster, L	6,062
14th District	
Shumway, Rep-Inc	167,478
Malberg, Dem	100,442
15th District	
Coelho, Dem-Inc	111,771
Harner, Rep	45,479
Harris, L	3,408
16th District	
Panetta, Dem-Inc	168,506
Monteith, Rep	45,711
17th District	
Pashayan, Rep-Inc	122,253
Lavery, Dem	49,345
18th District	
Lehman, Dem-Inc	120,448
Linn, Rep	51,807
19th District	
Lagomarsino, Rep-Inc	108,257
Hart, Dem	105,981
Donaldson, L	2,700
20th District	
Thomas, Rep-Inc	155,282
Reid, Dem	59,454
Bersohn, L	4,006
21st District	
Gallegly, Rep-Inc	171,073
Stevens, Dem	72,059
Jay, L	5,233
22nd District	
Moorhead, Rep-Inc	155,966
Simmons, Dem	58,904
Isaacson, P&F	6,036
Brown, L	4,053
23rd District	
Beilenson, Dem-Inc	140,189
Salomon, Rep	72,888
Vernon, L	4,282
Honigsfeld, P&F	3,146
24th District	
Waxman, Dem-Inc	106,828
Cowles, Rep	34,723
Green, P&F	3,378
Abrahams, L	2,518

25th District	
Roybal, Dem-Inc	80,425
Reyes, P&F	8,300
Thie, L	5,385
26th District	
Berman, Dem-Inc	121,404
Groderson, Rep	50,821
27th District	
Levine, Dem-Inc	141,396
Galbraith, Rep	61,737
Fulco, L	5,864
28th District	
Dixon, Dem-Inc	104,920
Adams, Rep	26,944
Johnson, L	2,977
Honigsfeld, P&F	2,696
29th District	
Hawkins, Dem-Inc	85,338
Franco, Rep	13,828
Gilmore, L	3,620
30th District	
Martinez, Dem-Inc	69,065
Ramirez, Rep	41,558
Myers, Al	2,590
Goldsworthy, L	1,776
31st District	
Dymally, Dem-Inc	97,518
May, Rep	34,435
Duren, L	3,958
32nd District	
Anderson, Dem-Inc	109,068
Kahn, Rep	47,981
Murdock, P&F	3,855
Denny, L	1,849
33rd District	
Dreier, Rep-Inc	145,071
Gentry, D	55,519
Lightfoot, L	6,389
Noonan, P&F	3,359
34th District	
Torres, Dem-Inc	88,103
House, Rep	48,641
Swinney, L	2,573
35th District	
Lewis, Rep-Inc	175,873
Sweeney, Dem	69,335
Shuman, L	4,713
36th District	
Brown, Dem-Inc	100,559
Stark, Rep	78,737
Valentine, L	3,308
Anderson, Al	3,272
37th District	
McCandless, Rep-Inc	163,698
Pearson, Dem	85,333
Flickinger, L	6,771
38th District	
Dornan, Rep-Inc	83,063
Yudelson, Dem	49,421
McKay, L	3,563
German, P&F	3,383

39th District	
Dannemeyer, Rep-Inc	161,568
Marquis, Dem	49,895
Connelly, L	7,174
40th District	
Cox, Rep	170,640
Lenney, Dem	76,367
Bloxham, L	4,317
Farsai, P&F	3,549
41st District	
Lowery, Rep-Inc	172,831
Kripke, Dem	81,836
Rider, L	4,891
Weber, P&F	4,462
42nd District	
Rohrbacher, Rep	144,017
Kimbrough, Dem	74,745
Rose, P&F	6,309
43rd District	
Packard, Rep-Inc	188,826
Greenebaum, Dem	67,951
Muhe, L	7,014
44th District	
Bates, Dem-Inc	85,315
Butterfield, Rep	51,646
Thompson, L	5,381
45th District	
Hunter, Rep-Inc	154,132
Lebiscopo, Dem	50,414
Willis, L	4,105

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 14, 1988, I served the within Supplemental Memorandum of the Members of the California Democratic Congressional Delegation in Support of Motion to Dismiss or Affirm in re: "Robert E. Badham, et al. v. March Fong Eu, et al.," in the United States Supreme Court, October Term 1987, No. 87-1818;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Roger Allan Moore, Esq.
310 First Street, S.E.
Washington, D.C. 20003
Counsel for Appellants

William S. Eggeling, Esq.
Ropes & Gray
30 Kennedy Plaza
Providence, Rhode Island 02903
Counsel for Appellants

James R. Parrinell_, Esq.
Nielsen, Merksamer, Hodgson,
Parrinello & Mueller
650 California Street
San Francisco, Califo[illegible]ia 94108
Counsel for Appellants

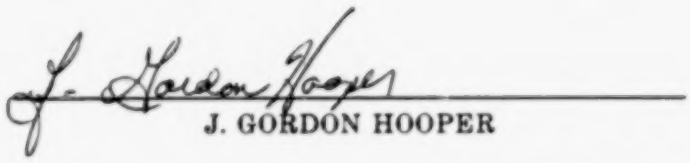
Robert E. Murphy, Esq.
Deputy Attorney General
6000 State Building
340 McAllister Street
San Francisco, California 94102
Counsel for March Fong Eu,
Secretary of State of the
State of California

Kathleen Purcell, Esq.
Remcho, Johansen & Purcell
220 Montgomery Street
Suite 800
San Francisco, California 94104
Counsel for the Assembly of the
State of California

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on December 14, 1988, at Los Angeles, California



J. GORDON HOOPER